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No. 88-1513

In The

# Supreme Court of the United States

October Term, 1988

ALFRED P. CHRISTOFFERSEN; WILLIAM J. GIBSON; RICHARD F. MAIN; and JOHN R. WARN,

*Petitioners,*

vs.

MAJOR GENERAL ROBERT J. COLLINS, former Adjutant General of Washington State; MAJOR GENERAL GEORGE COATES, Adjutant General of Washington State; ROBERT S. O'BRIEN, Treasurer, State of Washington; LIEUTENANT GENERAL LAVERN E. WEBER, former Chief National Guard Bureau; LIEUTENANT GENERAL EMMET H. WALKER, JR., former Chief National Guard Bureau; the WASHINGTON STATE AIR NATIONAL GUARD; the AIR NATIONAL GUARD OF THE UNITED STATES; the UNITED STATES GOVERNMENT through its agencies; the DEPARTMENT OF THE AIR FORCE; the DEPARTMENT OF DEFENSE; and the NATIONAL GUARD BUREAU,

*Respondents.*

## PETITIONERS' REPLY BRIEF

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the DEPARTMENT OF DEFENSE; and
the NATIONAL GUARD BUREAU,

*Respondents.*

## PETITIONERS' REPLY BRIEF

## ARGUMENT

The deafening message of the opposition briefs is that, "Yes, petitioners were fired because of MG Collins'

rancor and personal embarrassment over the nuclear reliability incident, – So What?"

Respondents refuse to acknowledge that *no* process exists to appeal an improper action by a State Adjutant General. The ostrich-like opposition would have this Court accept that 45,000 similarly situated National Guard Technicians must subject their federal civil service careers to the personal whims of ever changing State Adjutant Generals without a hope of even a hearing if they are wronged. This Court should settle important questions of federal law. An important federal question is raised when federal employees are fired for "whistle blowing" on violations of nuclear regulations and when both the State and Federal Governments that were embarrassed by this conduct, both agree that there is no appeal. The public policy of this Country is not to punish those who disclose wrongdoing. In fact, such conduct should be encouraged. No legal or moral society could exist if those who call attention to governmental wrongdoing are summarily dismissed with no opportunity to be heard.

The Opposition of the Respondents which seeks to sustain a process that denies petitioners their retirement because they did the right thing. The following reply is made.

**1. The Decision Below Is In Conflict With *Bollen v. National Guard Bureau*, 449 F. Supp. 343 (W.D. Pa. 1978).**

Rather than discussing the policy implications of the case, both respondents strain to make a factual distinction

between the decision in *Bollen* and the claim of petitioners. Essentially, the respondents point to the *Bollen* court's reference to a National Guard Bureau policy letter dated April 12, 1973, which addresses the right of "Grandfather" Technicians to remain in the Guard until age 60. It is true that the referenced letter refers only to "Grandfather" Technicians, and petitioners are not in that category. (Appendix 1, CR 110) Respondents' review of the record, however, overlooked the fact that there are *two* April 12, 1973, National Guard policy letters. The second letter of that date addressed retention of other Technicians, such as Petitioners. It states very clearly the age 55 policy that MG Collins violated when he fired the petitioners. (Appendix 3, CR 110)

> 1. Para. 6(e) NGR 20-4 and para. 9c. (1) ANGR 36-05, which are based upon sections 3848, 3851, 8848 and 8851 of title 10, United Stated Code, as amended by the National Guard Technicians Act of 1968 (Pub. L. 90-486), provide that commissioned officers who are technicians *will* be retained until attainment of eligibility for an immediate annuity, at age 55 under the Civil Service Retirement System.
>
> * * *
>
> 3. The National Guard Bureau policy with respect to officers in this category is as follows:
>
> > a. Application to retain an officer technician who would otherwise be removed from an active status under 10 U.S.C. 3848, 3851, 8848 or 8851 *will* be approved to cover the period required for him to complete the 20-years necessary to qualify for an immediate annuity under 5 U.S.C. 8336(d), or attainment of 55, whichever is later. An officer technician who will not be able to complete 20 years for the purposes of civil service retirement may be retained until age 60. In no case will an

> officer be retained beyond age 60 in order to complete the 20 years' service required for an immediate annuity. (emphasis added)

This is the type of language and letter that led the Court in *Bollen* to find a property right for the plaintiff. The approach of *Bollen* was rejected by the Ninth Circuit below, and a clear legal as well as factual conflict in decisions exists.

If parallel facts to *Bollen* are required, respondents need look only to the unchallenged affidavits of each petitioner offered in response to the motion for summary judgment. These affidavits set forth petitioners' reliance on the referenced regulation, the policy letter, and the actual custom in implementing the age 55 statutory policy, even to this date. (*See* Addendums to CR 24). The record is replete with unchallenged similar facts concerning implementation of the policy.

More significant than any quibble over factual distinctions, however, respondents have failed to address the *Bollen* Court's due process conclusion that " . . . clearly a proceeding pursuant to ANGR 36-06 falls far short of that required." *Id.* at 350. The Ninth Circuit is in conflict with the Third Circuit over the Constitutionality of the very regulation at issue.

Finally, the State respondent asserts that reliance on a *Bollen* analysis would result in " . . . near paralysis of the military in a mire of personnel litigation . . . if all personnel decisions were subject to constitutional challenges in Court." (State Brief, p. 3) Petitioners are not challenging all personnel decisions, they are just asking for some

constitutional due process. The appropriateness of a constitutional challenge to the regulation was even acknowledged by counsel for Washington State when it moved to join the federal government to the litigation. In support of the motion, the then assigned counsel argued in his affidavit:

> Furthermore, as an attorney for the State of Washington (and as the assigned legal counsel to the Washington State Militia described in Title 38 RCW), I do harbor personal reservations regarding the constitutional validity of ANGR 36-06, the National Guard Bureau regulation promulgated by the Director of the Air National Guard, which was invoked by defendant Collins in this instance. These reservations are predicated on the fact that this federal regulation effectively governs and limits " . . . the Appointment of . . . Officers" of the Washington State Militia in possible violation of Article I, Section 8, clause 16 of the United States Constitution, which reserves such authority exclusively to the several states. (CR 12)

This contradictory posturing by the State and Federal Government has continued unabated through a succession of assigned counsel so it is no longer possible to determine the position of either concerning the regulation.

### 2. There Is A Conflict With The Court Of Claims.

Both respondents side step the conflict with the decision of the Court of Claims which ruled it had no jurisdiction over National Guardsmen not in active service. Respondents seem to say that it might be possible to get some partial relief from the Air Force Board for Correction of Military Records, even though the Court which

would review that decision has said no jurisdiction exists to entertain the claim. This belated exhaustion argument urging the use of a Federal Administration Board is strange in light of this position taken by Assistant U.S. Attorney General J. Paul McGrath in front of the Court of Claims:

> What plaintiffs fail to perceive is that, even if their allegations were true (and they are not), their recourse is not against the United States and does not lie in this forum. That is precisely the holding in *Gnagy* where, without ever reaching the merits of the non-selection decision, this Court dismissed a virtually identical claim by an Army National Guard technician. (Government Reply Brief in the Court of Claims, p. 2)

And apparently the Court of Claims agreed because the Court states in *Christoffersen v. U.S.*, 230 Ct. Cl. 998 (1982):

> In *Gnagy* we held that a member of an NG unit not in active federal service is not a federal employee, in his military capacity, for purposes of the Back Pay Act. This court went on to say, 'Rather, he is a state employee. We are aware of no federal constitutional provision, statute, or regulation which authorizes this court to award monetary relief to a wrongfully discharged state employee.' 634 F.2d at 579 n.19.

And when each petitioner was terminated they were advised in writing by the State of Washington Guard:

> This separation is not regarded as an adverse action; therefore, there are no appeal rights under Title 32 U.S.C. (Appendix 6, CR 80)

Failure to advise Technicians of their appeal rights has been the successful basis for a challenge in the U.S. Court of Claims. *Athas v. U.S.*, 579 F.2d 772, (Ct. Cl. 1979).

However, when petitioners raised this same argument in the Court of Claims, they were told as Guardsmen they were State employees, and *no* federal statute granted their relief. Certiorari should be granted if for no other reason than to clarify what federal review authority exists over the improper action of a State Adjutant General.

Respondents have engaged petitioners in a game of courtroom ping pong. Neither will tell this Court which tribunal gets to hear their complete grievance. They would have this Court approve yet another "smash serve" sending petitioners to an administrative board, with limited record restoration power, with the predictable result that the Court of Claims' decision will be raised to defeat jurisdiction to pay their lost wages. The reason this case is in Federal Court is to obtain complete relief for petitioners. The Air Force Board for Correction of Military Records clearly can not grant complete relief and it is doubtful it has any authority in this case. This argument by Respondents does not meet the thrust of the petition.

### 3. The Intracircuit Conflict Is Significant.

Respondents lightly dismiss petitioners' reliance on the language of *Sebra v. Neville*, 801 F.2d 1135, 1140 (9th Cir. 1986) which permits judicial review of "military decisions made for non-military reasons". Respondents have *never* challenged the fact that MG Collins made a military separation decision solely for a non-military reason. Neither respondent tells this Court why the decision should not then be reviewed under the doctrine set forth in *Sebra*. The proposition is simple and makes for sound

legal principle. The *Sebra* rule allowing review should have been applied to petitioners and a trial on the merits permitted. Neither respondent even suggests why the principle is inapplicable to petitioner's claims.

## CONCLUSION

Respondents give a non-responsive statement that boldly asserts petitioners are in error, but gives no reasons why the Petition should be denied. The failure of respondents to articulate a logical response to petitioners' arguments supporting certiorari only amplifies the significance of the constitutional questions raised in this petition. The fallacy of respondents' position on certiorari is probably best put forth in the State's opening paragraph which argues:

> What is presented in this case is an attempt by petitioners to cloak military personnel matters with the full panoply of constitutional protections and rights which, although arguably applicable in a civilian context, have been uniformly found inapplicable in a military context by this Court and federal courts throughout the country; petitioners, in short, are challenging the heart of the military non-intervention doctrine.

Respondents would have this Court accept two propositions. First, that State Guardsmen not in active federal service are "military", and second, that military members have no constitutional rights. They are in error. All courts who have reviewed petitioner's claims find that a State Militia is nothing more or less than a State agency. When not in active federal service, the Militia is a state entity. If

the non-activated militias were part of the regular military, the full panoply of parallel and substantial constitutional protections of the military services long recognized and restated in *Chappell v. Wallace*, 462 U.S. 296, 303-304 (1983), would have been made available to Petitioners. Petitioners have not been given the basic rights of an active military member which would have allowed a challenge to a commander's arbitrary decision. They have been treated, just as the State says, as if they have no constitutional protection.

This Court has a duty to question any process which would deny a citizen a semblance of hearing when his livelihood and retirement is taken for a petty and illegal reason. As stated in the petition, a grant of review in this case will allow the Court to give the appropriate guidance on the applicability of the *Mindes v. Seaman* doctrine to the claims of State Militiamen. Neither respondent has presented an argument why such a review on the limited facts of this case would be inappropriate. Certiorari should be granted.

RESPECTFULLY SUBMITTED this 24th day of May, 1989.

CHARLES MATTHEW ANDERSEN
WINSTON & CASHATT
*Attorney for Petitioners*

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU
WASHINGTON, D.C. 20310

(SEAL)

REPLY TO
ATTN OF: NGB/DPM 12 April 1973

SUBJECT: Grandfather Clause Air Technicians

TO: The Adjutants General of all States, Commonwealth of Puerto Rico and the District of Columbia

1. References:

a. NGB/DPM letter, subject as above, dated 23 Feb 73.

b. NGB/DPM letter, subject as above, dated 14 Mar 73.

2. On 24 January 1973 the Secretary of the Air Force delegated to the Chief, National Guard Bureau the authority to retain until age 60 in an active status those Air National Guard officer air technicians employed prior to 1 July 1955 who have been continuously employed since that time. The authority is limited to those officers below the grade of brigadier general while the authority for retention of general officers was retained by The Secretary (Attachment 1).

3. In lieu of the procedure outlined in references 1 a. and b. above, the following instructions apply:

The air technician officers listed on Attachment 2 were employed prior to 1 July 1955, the effective date of ROPA, and under the provisions of Section 28, Public Law 85-861 were considered eligible for retention past the ROPA mandatory retirement

dates of 28 or 30 years service, or 5 years in grade. In order to clearly establish their status, the National Guard Bureau proposes to forward a one time list to the Air Reserve Personnel Center with instructions that the personnel are authorized to be retained to age 60 provided the officer is fully qualified to hold his military position and properly performing his technician job.

4. Your concurrence with the proposed action and return of the verified list to the Bureau, Attn: NGB/DPM will suffice for officers below general grade. The general officers must submit a request for retention at least six months prior to their 30th or 35th TYSD, or 5 years in grade, whichever is later, to the Bureau for Secretarial action. Adjutants General and Assistant Adjutants General are exempt from this requirement.

5. Those officers who do not desire or who The Adjutant General does not desire to retain until age 60 should be lined off the list.

/s/ Francis S. Greenlief
FRANCIS S.
GREENLIEF
Major General, USA
Chief, National Guard
Bureau

2 Atch
1. Ltr, DAF/CC, 24Jan73 Re: Extension of Off Air Techs Employed Prior to 1 Jul 55
2. List of Offs

DEPARTMENTS OF THE ARMY AND THE AIR FORCE

NATIONAL GUARD BUREAU

WASHINGTON, D.C. 20310

(SEAL)

NGB-JA 12 April 1973

SUBJECT: Retention of Army National Guard and Air National Guard Commissioned Officer Technicians Who Would Otherwise be Removed From an Active Status for Length of Service or Time in Grade

The Adjutants General of All States, Puerto Rico and the District of Columbia

1. Para. 6(e) NGR 20-4 and para. 9c.(1) ANGR 36-05, which are based upon sections 3848, 3851, 8848 and 8851 of title 10, United States Code, as amended by the National Guard Technicians Act of 1968 (Pub. L. 90-486), provide that commissioned officers who are technicians will be retained until attainment of eligibility for an immediate annuity, at age 55 under the Civil Service Retirement System.

2. It is clear from the legislative history of Pub. L. 90-486 and subsequent interpretations by the U.S. Civil Service Commission that an officer who is separated from his technician employment as the result of having been removed from an active status (and hence from his National Guard status) for time in grade or length of service, is considered to have been involuntarily separated from his Federal civil service employment. Such an employee is entitled to an immediate reduced annuity if he has 25 years of service, or after becoming 50 years of age completes 20 years of service (5 U.S.C. 8339(d)). The annuity is reduced by 1/6 of 1 percent for each full month

the employee is under 55 years of age at the date of separation. (5 U.S.C. 8339(g)).

3. The National Guard Bureau policy with respect to officers in this category is as follows:

a. Applications to retain an officer technician who would otherwise be removed from an active status under 10 U.S.C. 3848, 3851, 8848, or 8851 will be approved to cover the period required for him to complete the 20 years necessary to qualify for an immediate annuity under 5 U.S.C. 8336(d), or attainment of 55, whichever is later. An officer technician who will not be able to complete 20 years for the purposes of civil service retirement may be retained until age 60. In no case will an officer be retained beyond age 60 in order to complete the 20 years' service required for an immediate annuity.

b. An officer who is 55 years of age and has completed the 20 years service required for an immediate civil service annuity may thereafter be retained, on an annual basis upon evidence of singularly outstanding ability, and if he is otherwise fully qualified to hold his military position and is properly performing his technician job. Annual physical examination will be required for officers in this category.

c. As an exception to the foregoing, an Air National Guard officer who has been continuously employed as an Air National Guard technician (officer) since 30 June 1955 ("Grandfather clause" technicians, covered by section 28, Pub. L. 85-861, 10 U.S.C. 8846 n) and is in the grade of 0-4 or below, may not be removed from an active status, except for cause or physical disability, or by reason of

being twice passed over for promotion to the grade of captain, major or lieutenant colonel.

d. Officers described in c. who are in grades 0-5 and above may be retained until age 60, if they are fully qualified to hold their military positions and are properly performing their technician jobs. This determination, in the case of general officers will be made by the Secretary of the Air Force and in the case of 0-6 and 0-5 by Chief, National Guard Bureau.

4. These policies are effective on the date of this letter. However, retention authorized by Chief, National Guard Bureau before that date remain in effect for such periods as are specified in the letters approving the retention.

/s/ Francis S. Greenlief
FRANCIS S. GREENLIEF
Major General, USA
Chief, National Guard Bureau

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TPO (78-52) 14 August 1978

SUBJECT: Separation Due to Loss of Military Membership

Mr. Richard P. Main
Route 1, Box 45A
Reardan, Washington 99029

1. Reference Special Orders No. 96M, National Guard Bureau, dated 4 August 1978.

2. The contents of referenced Orders indicate your affiliation with the Washington National Guard will terminate on 30 September 1978. Under the provisions of TPM 753.1 this situation requires you be involuntarily separated from your positon as Flight Instructor (Fixed Wing), GS-2181, F1430000. This letter is forwarded in accordance with Title 32 U.S.C. 709 to provide you 30 days advance notice of actions to separate you from the position effective 30 September 1978.

3. Preliminary review of your personnel records discloses that you are entitled to severance pay, and a deferred retirement annuity at age 62, providing you do not withdraw your contributions to the CSC retirement fund. All earned annual leave to your credit and unused by the date of your separation will be paid in a lump sum with your final salary check. Your entitlement to severance pay will begin on 1 October 1978 and continue for 26 bi-weekly pay periods.

4. You may resign at any time after receipt of this notice. In such case, the customary advance notice required for resignation will be waived.

5. This separation is not regarded as an adverse action; therefore, there are no appeal rights under Title 32 U.S.C.

6. It is desired that this letter serve also to express an appreciation for your service while employed with the Washington Army National Guard. You can be assured that your service has materially aided this activity and the National Guard in accomplishing its mission. Please be assured that this action in no way reflects adversely upon your character, conduct or work performance. It is occasioned solely by condition set forth.

FOR THE ADJUTANT GENERAL:

1 Incl
Severance Pay Worksheet

FRANK E. ADAMS
Colonel, WA ANG
Personnel Officer